Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____ 76-1301

DUBUQUE COMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Citation to Opinions Below..... 1
Jurisdiction..... 2
The Questions Presented..... 2
Constitutional Provisions, Statutes and Rules Involved..... 2
Statement..... 3
Reasons for Granting the Writ..... 6
Conclusion..... 8
Appendix A - Order and Opinion of Court of Appeals dated December 14, 1976..... 9
Appendix B - Opinion of United States District Court for the Northern District of Illinois dated May 20, 1976.....11
Appendix C - Statutes and Federal Rules of Civil Procedure.....19
Appendix D - Primary Television Affiliation Agreement.....21
Appendix E - ABC Memorandum.....37

AUTHORITIES CITED

American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theatres, Inc., C.A.N.Y.1971, 446 F.2d 1131, certiorari denied 92 S.Ct. 737, 404 U.S. 1063, 30 L.Ed2d 752..... 7
Fortner Enterprises, Inc. v. U.S. Steel Corp., Ky.1969, 89 S.Ct. 1252, 394 U.S. 495, 22 L.Ed2d 495..... 6
Northern Pac. Ry. Co. v. U.S., Wash. 1958, 78 S.Ct. 514, 356 U.S. 1, 2 L.Ed2d 545..... 6

Statutes:

15 U.S.C. Section 1..... 3
15 U.S.C. Section 15..... 3
28 U.S.C. Section 1254(1)..... 2

Rules:

Federal Rules of Civil
Procedure 41(b)..... 3

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 14, 1976.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the above cause pursuant to Federal Rule of Civil Procedure 41(b), dated May 20, 1976, is attached as Appendix B hereto and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirming that Order of

Dismissal, dated December 14, 1976, is attached as Appendix A hereto and is not reported.

JURSIDICTION

The judgment of the Court of Appeals printed in Appendix A hereto, was entered on December 14, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

THE QUESTIONS PRESENTED

1. In a Sherman Act Section 1 tying case, does the fact that the tied item is supplied by a non-affiliated third party render the per se illegality rules inapplicable?

2. In a Sherman Act Section 1 tying case, is a provision in a written franchise agreement requiring the franchisee to pay for goods "in the event" such goods were previously ordered, the equivalent of a contractual conditioning of the franchise on the purchase by the franchisee of such goods where such goods had been previously ordered by the franchisor and the supplier thereof had delivered and installed them?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

There are no constitutional provisions involved in this case. 15 U.S.C.

Section 1 is claimed to make the tying conduct of Respondent illegal. 15 U.S.C. Section 15 gives Petitioner the right to sue if Respondent's conduct constitutes a tying arrangement in violation of the antitrust laws. Rule 41(b) of the Federal Rules of Civil Procedure gives the District Court acting without a jury the right to dismiss the action after presentation of Plaintiff's evidence and such a dismissal operates as an adjudication upon the merits. These provisions are printed in Appendix C hereto

STATEMENT

This action arises under Section 1 of the Sherman Act, as amended, 15 U.S.C. Section 1, and jurisdiction is present pursuant to Section 4 of the Clayton Antitrust Act, as amended, 15 U.S.C. Section 15. This suit alleges violations of the antitrust laws by Respondent, American Broadcasting Companies, Inc. (hereinafter referred to as ABC) in utilizing its power to grant network affiliation and the use of ABC programming and the ABC trade name and trademark to coerce Dubuque Communications Corporation (hereinafter referred to as KDUB) into using American Telephone & Telegraph (hereinafter referred to as AT&T) facilities to obtain its broadcast signal. KDUB, therefore, is alleging that ABC enforced an illegal product tying arrangement by making the use of the systems and services of AT&T a condition for the grant of the right to obtain ABC's network and other television programming. KDUB entered into a

primary television affiliation agreement with ABC on April 27, 1970, which is set out in Appendix D hereto. KDUB owned and operated a television station in Dubuque, Iowa, and alleges that the contract and affiliation agreement between KDUB and ABC and particularly Rider I of that agreement required KDUB to use the facilities of AT&T for the transmission of ABC's television signal from Cedar Rapids, Iowa, to Dubuque, Iowa, the location of Plaintiff's studio.

The pertinent parts of the affiliation agreement set out in Appendix D were the sections dealing with program delivery and Rider I. These provided as follows:

"D. PROGRAM DELIVERY

We will at our expense arrange for programs to be delivered to * * * the AT&T testboard in Cedar Rapids, Iowa. See Rider I."

Rider I provides:

"In the event connecting facilities are ordered for service to your station and you do not use such facilities because of a delay of the commencement of your station's operations, or failure to operate your station, or failure to use such facilities, or discontinuance of the use of such facilities, or for any other reason, you agree to assume any and all financial responsibility to the American Telephone & Telegraph Company or other carrier and to pay such company any charges for these facilities from the

availability date of connected service until you commence or recommence use of same facilities. Such commencement or recommencement of use of the facilities shall not be construed to terminate your obligation with regard to the facilities for any such period of nonuse."

Petitioner contends that there was no alternative to use another carrier, since the event contemplated by Rider I had already taken place. The connecting facilities had been ordered and were committed for. They had been ordered from AT&T, and not from some other carrier. They had been ordered by ABC and KDUB was told that it would be the customer to pay for and use those services. (See ABC memorandum, Plaintiff's Exhibit 20, Appendix E)

The court limited the trial of the case to the question of whether or not ABC coerced KDUB to use AT&T facilities and services for the transmission of ABC's television signal and a precondition of doing business with ABC. The district court found that the contractual affiliation agreement itself did not require the use of AT&T service and impose a tying arrangement nor did the facts and circumstances surrounding the execution of the affiliation agreement show coercion by ABC. Inherent in the court's ruling dismissing the action based upon the evidence was the fact that the tied item was supplied by a third party and not ABC and that the contract itself did not coerce KDUB.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning tying arrangements as prohibited by the antitrust laws of the United States. It is important to clarify these matters to increase the effectiveness of private antitrust actions as a means for enforcing the antitrust policy of the United States. Review of the questions presented by this case is appropriate for the following reasons:

1. It would clarify two of this court's prior decisions under Section 1 of the Sherman Act dealing with tying arrangements.

Fortner Enterprises, Inc. v. U.S. Steel Corp., Ky.1969, 89 S.Ct. 1252, 394 U.S. 495, 22 L.Ed.2d 495 and subsequent opinions.

Northern Pac. Ry. Co. v. U.S., Wash. 1958, 78 S.Ct. 514, 356 U.S. 1, 2 L.Ed.2d 545.

The question of whether or not the fact that the tied item is supplied by a non-affiliated third party renders the per se illegality rules inapplicable should be determined. In addition, the question of what constitutes a contractually coerced tying arrangement should be answered.

2. The case at bar involves the granting of a primary television affiliation to a small UHF television station and the conduct and relationships of the parties are of prime concern to the

communications industry in this country. Inherent in this case is the unequal bargaining position of the parties and the monopolistic atmosphere in which the television networks operate as a result of their size and position and the copyright and trademark provisions of our law. The trial court found that in effect there was no coercion because KDUB desired to use AT&T for transmission of ABC's television signal. In determining whether a party has been coerced into accepting an unlawful tying arrangement, the fact that the party found the contract economically advantageous given the available alternatives is not decisive since that is a necessary characteristic of most contracts including illegal ones.

American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theatres, Inc., C.A.N.Y.1971, 446 F.2d 1131, certiorari denied 92 S.Ct. 737, 404 U.S. 1063, 30 L.Ed2d 752.

It is important to the communications industry in this country that the policies and practices of the broadcast networks with regard to affiliation be examined, since the affiliation agreement in question could not have been too economically advantageous to Petitioner, which at present is insolvent and off the air.

3. It is important to clarify the law as to a Sherman Act Section 1 tying case and the application of the per se illegality rules and give conformity to the holdings and policies of the various circuit courts of appeals.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Daniel P. Ernst
Counsel for Petitioner
Suite 10 - American Tower Building
911 Locust Street
Dubuque, Iowa 52001

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
Argued December 8, 1976

December 14, 1976

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

DUBUQUE COMMUNICATION CORPORATION,
Plaintiff-Appellant,

No. 76-1686

vs.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Disvision.
No. 73 C 1473
Bernard J. Decker, Judge.

O R D E R

Plaintiff Dubuque Communication Corporation, owner and operation of television station KDUB in Dubuque, Iowa, brought suit against American Broadcast-

ing Companies, Inc. (ABC) alleging a violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. Sec. 1. On April 27, 1970 Dubuque entered into an affiliation agreement with ABC. Plaintiff claims that ABC imposed an illegal product tie-in by conditioning the grant of network affiliation that KDUB use American Telephone and Telegraph (AT&T) carrier services by a means of its obtaining the ABC television signal.

The case was tried before District Judge Bernard M. Decker on the issue of whether the use of AT&T was the result of force by ABC or of free choice on the part of the plaintiff. Evidence, both documentary and testimonial, was presented by both sides. Upon defendant's renewal of its motion to dismiss pursuant to Fed.R.Civ.P. 41(b) at the close of all the evidence, the district court granted the motion because of the plaintiff's failure to prove that ABC required to obtain its signal delivery from AT&T.

We agree that Dubuque did not prove an antitrust violation on the part of ABC and we adopt the opinion of the district judge as our own.

The order of the district court dismissing the action is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DUBUQUE COMMUNICATIONS CORPORATION, Plaintiff,	)	
vs.	)	NO. 73 C 1473
AMERICAN BROADCASTING COMPANIES, INC., Defendant.	)	

MEMORANDUM OPINION

Plaintiff Dubuque Communications Corporation (Dubuque), which owned and operated television station KDUB-TV in Dubuque, Iowa, has brought this suit alleging violations of the antitrust laws by defendant American Broadcasting Companies, Inc. (ABC). The core of the complaint is the assertion that ABC violated Section 1 of the Sherman Act, 15 U.S.C. Section 1, by utilizing its power to grant network affiliation and the use of ABC programming and the ABC tradename and trademark to coerce Dubuque into obtaining its broadcasting signal through American Telephone & Telegraph (AT&T). Dubuque therefore is alleging that ABC enforced an illegal product tie-in by making use of AT&T a condition for the grant of the right to

FILED, MAY 20, 1976, H. STUART CUNNINGHAM, Clerk

obtain a first call on ABC television programming.

This case was brought to trail on February 17, 1976. Both parties presented evidence and testimony on the issue of coercion, and extensive documentary evidence and several depositions were also introduced. Defendant has renewed its motion for dismissal pursuant to F.R.Civ.P. 41(b). After consideration of the evidence and the post-trial submissions requested by the court, the court now files this opinion which constitutes the findings of fact and conclusions of law required by F.R.Civ.P. 52(a).

This court concludes that plaintiff has failed to prove that ABC has committed any violation of the Sherman Act, and that there is no meaningful evidence to substantiate a finding that ABC sought to impose any illegal procuct tie-in.

Initially the court notes that the April 27, 1970, affiliation agreement between the parties neither expressly nor impliedly contains any condition requiring Dubuque to utilize AT&T facilities for signal transmission. While the contract does make plaintiff responsible for the costs of signal delivery, it does not limit plaintiff's choice among the alternative means for such delivery. To the contrary, Rider I to the affiliation agreement speaks of plaintiff's financial responsibility to "American Telephone & Telegraph Company or other carrier". (Emphasis added.

Since there is no contractual foundation for the alleged tie-in requirement, the burden is on Dubuque to prove from all the extrinsic circumstances surrounding and including the April 1970 affiliation agreement that the cause of plaintiff's use of AT&T was a reasonable belief that ABC forced it to accept such a condition. Halverson v. Convenient Food Mart, Inc., 1975 Trade Cas. 60,254 at 65,993 (N.D.Ill. 1974); Abercrombie v. Lum's, Inc. 345 F.Supp. 387, 390 (S.D.Fla. 1972). Plaintiff has failed to satisfy this obligation.

The evidence clearly indicates that ABC at all times had a policy requiring stations seeking affiliation for small market areas such as that offered by Dubuque to pay for the costs of signal reception. The policy applied regardless of whether the signal was carried by AT&T, microwave systems, or through "off-air" delivery. It is also clear that plaintiff was aware of this policy from almost the inception of negotiations with ABC.

While the owners of KDUB-TV were not men extensively experienced in the television broadcasting business, the record does support the finding that as early as 1968 they had begun research into the costs of signal delivery. In 1968 Gerald Green, one of the station's principal owners, contacted AT&T, and received by letter information concerning the costs of signal delivery.

It is also clear that Mr. Green was aware of alternative means of signal

delivery, despite his testimony that he did not fully understand these methods. It is shown by the evidence that officers and agents of KDUB-TV had visited various other television stations in the Midwest in the course of their research into broadcasting methods. These included stations utilizing private microwave relay. Conversations also covered the use of off-air signal delivery systems. Also, various means of signal transmission were considered by KDUB-TV officials for the purpose of expanding the station's broadcasting to the LaCrosse, Wisconsin, area.

Additionally the evidence reveals that Gerald Green paid $19,000 to an ABC employee, Thomas Sullivan, who was acting without authority from ABC, in order to obtain an ABC affiliation which would include an AT&T hook-up at plaintiff's station. Green repeatedly called Northwestern Bell requesting installation of a delivery system at his station. After being informed that ABC had not authorized such installations at its own expense, Green did not make any request to remove those facilities which had already been completed.

At no point in the negotiations did plaintiff ever indicate any opposition to use of AT&T for signal reception, nor did it ever make any statement revealing a preference for any alternate method. Nor was any objection made after the affiliation agreement to Northwestern Bell.

The only coherent conclusion that can be drawn from this evidence is that

plaintiff, which had reason to be aware of alternative signal transmission systems, knew the virtues and costs of AT&T delivery and had freely decided to use that method.

Under these circumstances Dubuque cannot contend that but for the alleged coercion by ABC it would not have utilized AT&T or that it would have been more prompt in dropping AT&T.

This being the case, plaintiff has not satisfied the burden for proof of a Sherman Act tie-in violation. It has not shown that ABC caused the television station to take a course it would not have otherwise traveled, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 128-29 (1969). Since it can be found that Dubuque would have utilized AT&T signal transmission in any event, causation for the alleged injury cannot be laid at the door step of ABC. As another court has held

> "(I)f it were shown that a class member purchased feed (the tied in product) . . . because he believed it to be the best product available for his purposes, or for any reason other than the alleged tie, he would have failed to establish the essential causation element of his treble damage claim." Plekowski v. Ralston Purina Co., 1975-2 Trade Cas 60,411, at 66,801 (M.D.Ga. 1975).

See also Carlson Companies, Inc. v.

Sperry & Hutchinson Co., 374 F.Supp. 1080, 1087 (D.Minn. 1974).

It is apparent from the evidence that in fact the question of signal delivery was a matter of relative indifference to the plaintiff. While Dubuque through its counsel made an extensive and intense presentation in behalf of its contract demands, and threatened suit in the event that network affiliation was denied, Dubuque never indicated that there was any controversy regarding signal delivery. Indeed counsel for Dubuque indicated in its letters to ABC that it expected to utilize the existing AT&T lines to carry the programming. While plaintiff may have desired ABC to bear the cost of signal delivery, its counsel was aware that this was contrary to network policy and did not stress this issue.

Furthermore, it is apparent that counsel for the plaintiff was informed of the details of the ABC contract offer prior to the date of that agreement. The court finds more credible that evidence and testimony indicating that Gerald Green was aware of the contract terms in advance of April 27, 1970.

At that meeting it is conceded that no objection was made to the provisions of the affiliation agreement dealing with signal delivery. Nor is it alleged that any representative of ABC specified that Dubuque was obligated to utilize AT&T facilities. Dubuque never indicated any interest at this meeting in any other means of signal delivery.

In the above factual context it is evident that plaintiff cannot show that it was coerced into accepting AT&T signal transmission. Proof of coercion at least requires evidence that the undesired condition was imposed over plaintiff's objection, or at the explicit refusal of the defendant to do otherwise. When a condition is accepted without objection the element of coercion becomes totally speculative.

As one court has stated

> "ABC's preliminary bargaining position may have influenced (plaintiff) but (plaintiff) did not persevere long enough with its ideal lineup to feel any economic pressure from ABC, and we cannot now know whether ABC would ever have tried to bring any such pressure to bear." American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.; 446 F.2d 1131, 1137 (2d Cir. 1971), cert. den. 404 U.S. 1063 (1972).

See also, U.S. v. Loew's, Inc., 371 U.S. 38 (1962); Capital Temporaries, Inc. v. Olsten Corp., 365 F.Supp. 888 (D.Conn. 1973), aff'd 506 F.2d 658 (2d Cir. 1974).

Nor can the coercion necessary to sustain a finding of an illegal tie-in be inferred from mere economic inequality between the parties to a contract. In reversing a trial court where this argument was asserted, the Third Circuit recently made an explicit rejection of

this theory in Ungar, et al. v. Dunkin' Donuts, et al., No. 75-1625-6 (3d Cir. 3/3/76). The court limited the proof for a tie-in claim as follows:

> "Where, as here, plaintiff . . . place(s) no reliance on express contractual tie-ins, (he) must prove that his purchases were coerced as an element of establishing a prima facie case of illegal tying." (At p. 31.)

In sum, the court finds no basis for the contention that ABC imposed an illegal tie-in of AT&T systems delivery upon the plaintiff. No such requirement, either express or implied, can be found in the contract. Nor has the plaintiff shown that its choice of AT&T delivery was the result of coercion on the part of ABC. Rather, the court finds that all intrinsic evidence and circumstances indicate that the decision to utilize AT&T was a voluntary decision made after some research by the plaintiff. The parties dealt with each other under the understanding that Dubuque had chosen AT&T delivery, and the question of signal transmission was not the subject of any meaningful discussion. These being the facts, plaintiff has failed to prove that ABC violated the antitrust laws, and defendant ABC's motion to dismiss pursuant to F.R.Civ.P. 41(b) should be, and hereby is, granted, and the instant cause is ordered dismissed.

DATED: ENTER:

May 20, 1976 /s/ Bernard M. Decker
United States District Judge

APPENDIX C

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

15 U.S.C. Section 1

TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL: EXCEPTION OF RESALE PRICE AGREEMENTS: PENALTY

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:" (this case does not involve any resale price maintenance agreements or criminal charges.)

15 U.S.C. Section 15

SUITS BY PERSONS INJURED, AMOUNT OF RECOVERY

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

28 U.S.C. Section 1254

COURT OF APPEALS, CERTIORARI: APPEAL: CERTIFIED QUESTIONS

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1)By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Rule 41(b) of the Federal Rules of Civil Procedure

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF.

" * * * After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

APPENDIX D

AMERICAN BROADCASTING COMPANY
1330 Avenue of the Americas -
New York, N.Y. 10019

LT 1-7777

PRIMARY TELEVISION AFFILIATION AGREEMENT

Dubuque Communication Corp.
Dubuque, Iowa

April 24, 1970

TELEVISION STATION KDUB TV

Gentlemen:

In order that your station may continue to serve the public interest, convenience and necessity, this Company and your Television Station KDUB TV hereby mutually agree upon the following plan of network cooperation.

I. NETWORK AFFILIATION AND PROGRAM SERVICE

A. FIRST CALL

We will offer you, for television broadcasting by your station, the first call on all our network television programs which are to be broadcast on a network basis in the community to which your station is licensed by the Federal Communications Commission. Notwithstanding the foregoing, ABC shall have the right to authorize any television

broadcasting station regardless of the community to which it is licensed by the FCC, to broadcast any network presentation of a subject we deem to be of immediate national significance including, but not limited, to a Presidential address.

B. PROGRAM SERVICE

The program service we are offering will be as follows:

1. Network Sponsored Programs

"Network sponsored programs," as used in this agreement, shall mean those television network programs which contain one or more commercial announcements paid for by or on behalf of one or more ABC Network advertisers.

a) We will offer you all ABC television network sponsored programs for which sponsors may request broadcasting in the community to which your station is licensed.

b) You agree to broadcast network sponsored programs in their entirety, including but not limited to the network commercial announcements, network identifications, program promotional material or credit announcements contained in such programs which you accept, without interruption or deletion or addition of any kind. Notwithstanding the foregoing, you may sub-

stitute other ABC-TV promotional announcements in lieu of program promotional material concerning a network program for which your station has not been ordered or in lieu of program promotional material which is inaccurate as it pertains to your station. It is also understood that no commercial announcement, promotional announcement or public service announcement will be broadcast by you during any interval within a network program designated by ABC as being for the sole purpose of making a station identification announcement.

2. Network Sustaining, Cooperative and Spot Carrier Programs

a) We will from time to time offer you live or recorded network programs identified as sustaining programs, cooperative programs or spot carrier programs. Except as set forth below in subparagraphs (b) and (c), you agree to broadcast such programs which you accept in their entirety without interruption or deletion or addition of any kind.

b) The network sustaining programs which we may offer to you may not, without our prior written consent, be sold by your station for commercial sponsorship or interrupted for commercial

announcements or used for any purpose other than sustaining broadcasting. The charges to you for recorded sustaining programs will be as follows:

$100. per clock hour for film or taped programs (black and white)

$200. per clock hour for film or taped programs (color)

c) You may carry the cooperative or spot carrier programs on the same basis as regular sustaining programs or you may offer them for commercial sponsorship on terms and conditions specified by us at the time such programs are offered to you.

C. PROGRAM ACCEPTANCE

You agree that you will advise us within 15 days of the date of our offer of your acceptance or rejection of any offer by us relating to a regularly scheduled network program. With respect to any network program not regularly scheduled, you will advise us of your acceptance or rejection of our offer within 72 hours (exclusive of Saturdays, Sundays and holidays) after such offer has been received at your station. However, if the first broadcast referred to in our offer is scheduled to occur within less than 15 days after the date of our offer with respect to regularly scheduled network programs or less

than 72 hours after our offer has been received at your station with respect to network programs not regularly scheduled, you shall notify us of your acceptance or rejection of such offer as promptly as possible, but in no event after the first broadcast time specified in such offer. Acceptance by you of our offer of a network program(s) shall constitute your agreement to broadcast such network program(s) in accordance with the terms of this agreement and of our offer to you.

D. PROGRAM DELIVERY

We will at our own expense arrange for programs to be delivered to the AT&T testboard in Cedar Rapids, Iowa. SEE RIDER I

II. NETWORK STATION RATE

1. The network station rate for your station shall be BONUS

III. NETWORK STATION COMPENSATION

1.
2.
3. We may at any time, upon notice to you, substitute for any scheduled network program another network program, except that if such other network program in our judgment involves a special event of public interest or importance, no such notice is required.
4. Nothing contained in this agreement shall be construed to prevent or hinder us, at any time upon notice

to you as soon as practicable, from cancelling one or more network programs, whether sponsored or sustaining.

5. With respect to network programs offered or already contracted for pursuant to this affiliation agreement, nothing herein contained shall be construed to prevent or hinder you from (a) rejecting or refusing network programs which you reasonably believe to be unsatisfactory, unsuitable or contrary to the public interest, or (b) substituting a program, which in your opinion, is of greater local or national importance. You shall give us prompt telegraphic notification of any such refusal, rejection or substitution.

IV. CUT-IN ANNOUNCEMENTS AND LOCAL TAG SERVICES

A. CUT-IN ANNOUNCEMENTS

"Cut In Announcements", as used herein, shall mean the substitution of a special commercial in place of a regularly scheduled network commercial.

1. Upon at least twenty-four (24) hours' notice, you shall, at our request, furnish such personnel and equipment as may be necessary to (a) broadcast cut-in announcements from your station alone, or (b) originate from your station cut-in announcements to one or more other stations, without regard

to whether or not your station is requested to broadcast said cut-in announcement(s). Not withstanding anything contained in this agreement, you may refuse to broadcast any such cut-in announcement in the community to which your station is licensed by the FCC if, in your opinion, it is not in the public interest, convenience or necessity, but you shall nevertheless furnish such personnel and equipment as may be necessary to originate such cut-in announcement(s) from your station to one or more other stations.

2. Cut-in announcements shall be broadcast only when authorized by us and then, only in accordance with the instructions furnished to you. You will be supplied, as promptly as possible, with the material and instructions for these announcements.

3. We may cancel any order for cut-in announcements without liability on our part, provided we do so upon not less than twenty-four (24) hours' notice to you, failing which, we will pay you the compensation you would have received if the announcement(s) had continued as scheduled for twenty-four (24) hours following receipt by you of such notice of cancellation.

4.

B. LOCAL TAG SERVICES

"Local Tag Announcements", as used herein, shall mean a visual commercial announcement, made by you on behalf of a local dealer of a network advertiser, not exceeding 10 seconds of a one-minute network commercial announcement projected by means of a slide and not utilizing more than two (2) slides.

1. Upon at least twenty-four (24) hours' notice, you shall, at our request, furnish such personnel and equipment as may be necessary to broadcast "local tag announcements".

2. Local tag announcements shall be broadcast in accordance with our instructions. The network advertiser shall supply to you or purchase from you, as promptly as possible, the slide(s) for each local tag announcement. Local tag announcements shall not be accompanied by oral announcements unless the network advertiser shall make direct requests of you therefor and shall have assumed sole responsibility for payment of such oral announcements.

3. We may cancel any order for local tag announcements without liability on our part provided we do so upon not less

than twenty-four (24) hours' notice to you, failing which we will pay you the compensation you would have received if the local tag announcement(s) had continued as scheduled for twenty-four (24) hours following receipt by you of such notice of cancellation.

4.

V. GENERAL

1. You will submit to us in writing, upon forms provided by us for that purpose, such reports covering network programs broadcast by your station as ABC may request from time to time.

2. Subject to the provisions of subparagraph 2 of Section III of this agreement, neither you nor ourselves shall incur any liability hereunder because of our failure to deliver, or your failure to broadcast, any or all network programs due to:
(a) failure of facilities
(b) labor disputes, or
(c) causes beyond the control of the party so failing to broadcast.

3. In the event the the transmitter location, power, frequency or hours of operation of your station are changed at any time so that your station is of less value to us as a network outlet than it is as of

the date of this agreement, we will have the right to terminate this agreement upon thirty (30) days' advance written notice.

4. You agree not to assign or to transfer any of the rights or privileges granted to you under this agreement without our prior consent in writing. You also agree that if any application is made to the Federal Communications Commission pertaining to an assignment or a transfer of control of your license, or any interest therein, you shall notify us immediately of the filing of such application. Except as to assignments or transfers of control comprehended by Section 1.540(b) of the Rules and Regulations of the Federal Communications Commission, we shall have the right to terminate this agreement effective as of the effective date of any assignment or transfer of control (voluntary or involuntary) of your license or any interest therein, provided ABC shall have given you notice of such termination within thirty (30) days after we have been advised that such application for assignment or transfer has been filed with the Federal Communications Commission. If we do not so terminate this agreement, you agree, prior to the effective date of any such assignment or transfer of control of your

stations to procure and deliver to us, in form satisfactory to us, the agreement of the proposed assignee or transferee that, upon consummation of the assignment or transfer of control of your station's authorization, the assignee or transferee will assume and perform this agreement in its entirety without limitation of any kind. If you fail to notify us of the proposed assignment or transfer of control of your station's authorization, or fail to procure the agreement of the proposed assignee or transferee in accordance with the preceding sentence, we shall have the right to terminate this agreement upon thirty (30) days' notice to you and the transferee or assignee, after the effective date of such assignment or transfer or the date on which we learn of such assignment or transfer, whichever is later.

5. You agree not to authorize, cause, permit or enable anything to be done whereby any program which we supply to you herein may be used for any purpose other than broadcasting by your station in the community to which it is licensed, which broadcast is intended for reception by the general public in places to which no admission is charged.

6. Except with our prior written consent and except upon such terms and conditions as we may impose, you agree not to authorize, cause, permit or enable anything to be done whereby a recording on film, tape or otherwise is made or a recording is broadcast, of a program which has been, or is being, broadcast on our network.

7. With respect to any and all promotional material issued by you or under your direction or control, you agree to abide by any and all restrictions of which we advise you pertaining to the promotion of a network program(s) scheduled to be broadcast by you in your community, including, but without limitation, on-the-air promotion, billboards, and newspaper or other printed advertisements, announcements or promotions.

8. You agree to maintain for your television station such licenses, including performing rights licenses as now are or hereafter may be in general use by television broadcasting stations and necessary for you to broadcast the television programs which we furnish to you hereunder. We will clear at the source all music in the repertory of ASCAP and of BMI used on our network programs, thereby licensing the broad-

casting of such music on such programs over your station.

9. The furnishing of film or tape recorded programs hereunder is contingent upon our ability to make arrangements satisfactory to us for the film or tape recordings necessary to deliver the programs to you. Such film or tape recorded programs shall be used only for a single television broadcast over your station. Positive prints of film or tape recorded programs are to be shipped by us, shipping charges prepaid, and you agree to return to us or to forward to such television station as we designate, shipping charges prepaid, each print or copy of said film or tape recording received by you hereunder, together with the original reels and containers furnished therewith. You will return or forward all prints in the same condition as received by you, ordinary wear and tear excepted, immediately after a single TV broadcast over your station. In the event you damage a print of any film or tape recorded program which is delivered to you, or fail to return or forward the original reels and containers furnished therewith, as aforesaid, you agree to pay the cost of replacing the complete print, original reels and/or containers as and when billed by us.

10. No inducements, representations or warranties except as specifically set forth herein have been made by any of the parties to this agreement. This agreement constitutes the entire contract between the parties hereto and no provision thereof shall be changed or modified, nor shall this agreement be discharged in whole or in part, except by an agreement in writing, signed by the party against whom the change, modification or discharge is claimed or sought to be enforced; nor shall any waiver of any of the conditions or provisions of this agreement be effective and binding unless such waiver shall be in writing and signed by the party against whom the waiver is asserted; and no waiver of any provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or of any other provision.

11. This agreement shall be governed by and construed in accordance with the laws of the State of New York.

VI. TERM

This agreement shall become effective at 3:00 AM, NYT, on the 27th day of April, 1970, or such time as you shall commence commercial operation, whichever is later, and it shall continue for twenty-four

(24) months thereafter. It is understood and agreed, however, that this agreement is subject to the commencement of commercial operation on Channel 40, Dubuque, Iowa, by you not later than October 24, 1970. If you do not commence such broadcast operations by such date, this agreement shall be null and void.

It is further understood and agreed, however, that this agreement may be terminated by either party upon giving the other party four (4) weeks advance written notice of its intention so to do.

If, after examination, you find that the arrangement herein proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours,

AMERICAN BROADCASTING COMPANIES, INC.

By /s/ Richard L. Beesemyer
Vice President, In Charge of
Affiliate Relations

Accepted this 27 day of
April, 1970
Dubuque Communication Corp.
Television Station KDUB TV
By /s/ Gerald J. Green

Rider I

In the event connecting facilities are ordered for service to your station and you do not use such facilities because of a delay of the commencement of your station's operations, or failure to operate your station, or failure to use such facilites, or discontinuance of the use of such facilties, or for any other reason, you agree to assume any and all financial responsibility to the American Telephone & Telegraph Company or other carrier and to pay such company any charges for these facilities from the availability date of connected service until you commence or recommence use of same facilities. Such commencement or recommencement of use of the facilities shall not be construed to terminate your obligation with regard to the facilities for any such period of non-use.

PX-2

APPENDIX E

AMERICAN BROADCASTING COMPANY
INTERDEPARTMENT CORRESPONDENCE

To Mr. Richard L. Beesemyer

From Arnold Marfoglia

Date April 27, 1970

Subject KDUB

As you requested, the following defines the ABC responsibility for supplying programs to KDUB via AT&T.

ABC will deliver full service to the AT&T testboard in Cedar Rapids, Iowa. This is the extent of ABC's responsibility. KDUB will be the customer for AT&T service from Cedar Rapids to their facilities in Dubuque, Iowa. KDUB will inform the telephone company when they want the service to commence and the telephone company will bill KDUB for this service.

To physically obtain service from Cedar Rapids to Dubuque, ABC ordered AT&T to construct temporary facilities to provide this feed. AT&T was also told to start work on a permanent facility to provide ABC service from Cedar Rapids to Dubuque.

The telephone company estimated that the construction cost for both the temporary and permanent service would be between thriteen and fourteen thousand dollars. This cost is amortized over a ten year

period, liability being reduced by 1/120th each month that KDUB receives service from AT&T.

As KUDB will be the customer for ABC service between Cedar Rapids and Dubuque, Iowa, the telephone company will hold KDUB responsible for any unamortized construction costs, should KDUB cancel service before the ten year period is completed.

/s/ Arnold Marfoglia
Arnold Marfoglia

Del. by hand to -
Mr. David Hammer
Mr. Wm. Bernton
Mr. Jerry Green

AM:acs

PX - 20

Supreme Court, U. S.
FILED
APR 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1301

DUBUQUE COMMUNICATION CORPORATION,
Petitioner,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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Attorneys for Respondent American Broadcasting Companies, Inc.

Dated: April 1, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This private treble damage antitrust action under Section 4 of the Clayton Act (15 U.S.C. § 15 (1970)) alleged that Respondent American Broadcasting Companies, Inc. ("ABC") violated Section 1 of the Sherman Act (15 U.S.C. § 1 (1970)) by conditioning per-

mission to broadcast ABC programs on a requirement that Petitioner use American Telephone and Telegraph ("AT&T") carrier services as a means of obtaining delivery of the ABC television signal to Petitioner's television station ("KDUB") in Dubuque, Iowa.

Petitioner stipulated it was ABC's policy not to tie access to ABC programs to use of any particular signal delivery carrier.

> *Stipulation of Fact.* 70. ABC stated policy as set forth in its Policies and Procedures books, provides that in those cases in which the station is responsible for part or all of its signal delivery, the station is permitted to utilize whatever method or methods the station chooses to receive network service (*e.g.*, AT&T, miscellaneous common carrier, private microwave, off-air, etc.) ABC's policy with respect to signal delivery is stated in printed books of ABC Policies and Procedures dated October 9, 1970 and October 1, 1972, copies of which were sent to KDUB on or about those dates. This policy was in effect in April 1970.[1]

However, Petitioner claimed that evidence of intent and of the particular circumstances surrounding the formation and operation of this otherwise routine contract would prove Petitioner was a singular exception to ABC policy.[2] Therefore, the trial court received evidence describing the parties, their intent and all of the conduct leading up to and including acceptance of the contract.[3] The court also received evi-

[1] Pretrial Order Attachment A, dated February 5, 1976, ¶ 70 at 19-20.

[2] *Id.*, trial tr. at 7-8.

[3] *E.g.* Trial tr. at 2-4, 8, 256-69, 360-68, 376, 483-86, 488-89, 580, 620-21, 625-32, 634-38, 644-48, 679-81; Pretrial Order Attachment A, dated February 5, 1976, ¶¶ 1-17, at 2-7.

dence of the conduct of the parties subsequent to the contract, including Petitioner's decision to discontinue AT&T delivery services in favor of a different method, the ABC assistance to Petitioner's operations which was made necessary by that change and ABC's subsequent renewal of the affiliation under those circumstances.[4]

Upon consideration of this evidence and post-trial submissions relating to ABC's Motion to Dismiss, the court made findings of fact and conclusions rejecting Petitioner's position and dismissing the complaint pursuant to Fed. R. Civ. P. 41(b). The court found Petitioner failed to prove "that its choice of AT&T delivery was the result of coercion on the part of ABC."[5] Moreover, the court held:

> The only coherent conclusion that can be drawn from this evidence is that plaintiff, which had reason to be aware of alternative signal transmission systems, knew the virtues and costs of AT&T delivery and had freely decided to use that method.[6]

On appeal Petitioner reversed its field and argued the extrinsic circumstances should have been ignored on the theory that the television affiliation agreement taken alone in effect raised an irrebuttable presump-

[4] *E.g.*, Trial tr. at 232-235, 568; Pretrial Order Attachment A, dated February 5, 1976, ¶ 87 at 22. The statement in the Petition that plaintiff is off the air may be misleading. ABC continued the affiliation with plaintiff until plaintiff ceased operations. Trial tr. at 232.

[5] Petitioner's Appendix B at 18.

[6] *Id.* at 14-15.

tion of a tie-in.[7] Thus, on appeal, Petitioner did not contend that the trial court's findings with respect to the extrinsic facts were unsupported or clearly erroneous.[8] Rather, Petitioner argued the provisions of the contract (when taken together with Petitioner's version of some but not all of the extrinsic evidence) [9] should have been held to imply a condition and it was error not to construe this implied condition to constitute the equivalent of coercion [10] (even in the face of a stipulation that it was against ABC policy to tie signal delivery via AT&T to access to programs and in the face of an uncontested finding that extrinsic evidence proved the absence of coercion in fact).

The court of appeals reviewed the contract and the extrinsic evidence and unanimously agreed that Petitioner failed to prove a required element of the antitrust violation charged.[11]

REASONS THE WRIT SHOULD NOT BE GRANTED

No question of law, policy or procedure warranting consideration by this Court is presented.

ARGUMENT

The first question Petitioner seeks to present (whether supply of a putative tied item by a third party renders the per se rules inapplicable) was not reached by the trial court and was not raised in the appellate court

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[7] Plaintiff's Opening Brief on Appeal, dated August 24, 1976, at 6.

[8] *Id.*

[9] *See infra* n. 18.

[10] Plaintiff's Opening Brief on Appeal, dated August 24, 1976, at 6.

[11] Petitioner's Appendix A, at 9-10.

below. It was not reached or raised below because the issue upon which Petitioner lost in the trial court was a factual prerequisite to antitrust liability under either the per se or rule of reason method of analysis. Petitioner lost on a question fundamental to section 4 of the Clayton Act [12] as well as section 1 of the Sherman Act:[13] causation.[14] ABC proved that in fact Petitioner used AT&T "by reason of" free and voluntary choice by Petitioner, not coercion by ABC.[15]

The second question Petitioner seeks to present (whether the television affiliation agreement was the "equivalent of a *contractual* conditioning") [16] was only a part of the larger threshold question of fact: why did Petitioner use AT&T? Coercion or free choice? Every facet of this question was resolved after trial by the court overwhelmingly and in all respects against Petitioner. First, it was found the terms of the contract alone did not state the condition Petitioner claimed.[17] As a matter of fact, it was found Petitioner's choice

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[12] 15 U.S.C. § 15 (1970).

[13] 15 U.S.C. § 1 (1970).

[14] *E.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 128 (1969); *see Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 97 S. Ct. 74 (1976); *Plekowski* v. *Ralston Purina Co.*, 1975-2 Trade Cas. ¶ 60,411 (M.D. Ga. 1975).

[15] Section 4 of the Clayton Act allows recovery only by "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws. . . ." (15 U.S.C. § 15 (1970)) (emphasis added). *Compare* Petitioner's Appendix B at 15.

[16] Petition at 2.

[17] Petitioner's Appendix B. Indeed Petitioner had conceded as much before trial in insisting that the court receive all the extrinsic evidence. Trial tr. 4-7; *see* Stipulation No. 70, quoted at p. 2, *supra*.

and use of the putative tied product were in all respects voluntary and the contract did not in operation impose the condition claimed.[18] That finding of fact was not challenged by Petitioner in the court of appeals as being unsupported by the evidence.[19] Thus Petitioner's argument in the court of appeals, like the second question it seeks to present to this Court, amounted to no more than the proposition that a so-called voluntary tie-in should be deemed to raise a presumption of liability irrebuttable by testimony or other extrinsic evidence.[20] This argument was rejected by the Seventh Circuit just as its underlying premise had been rejected by every circuit to consider it, including the Third Circuit in the case of *Ungar* v. *Dunkin' Donuts of America, Inc.,* in which certiorari was recently denied by this Court.[21]

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[18] The trial court's interpretation of the contract language, which was affirmed by a unanimous Court of Appeals, and which comported with the plain meaning of the words, ABC policy, the intent of the drafters and the conduct of the parties should not be reversed unless it is not reasonably capable of being read the way it was. *Richter* v. *Westab, Inc.,* 529 F.2d 896 (6th Cir. 1976); *G. & R. Corp.* v. *American Security & Trust Co.,* 523 F.2d 1164, 1173 (D.C. Cir. 1975); *Palmer* v. *Howard,* 493 F.2d 830, 835 (10th Cir. 1974); *Martin* v. *Vector Co.,* 498 F.2d 16, 22 (1st Cir. 1974). Petitioner is trying to re-argue the facts when in its second question presented (Petition, p. 2) it suggests ABC ordered the allegedly tied product, and therefore the "event" prospectively contemplated by the agreement had occurred. It had not occurred. The facts proved Petitioner placed the only operative order with AT&T; moreover, in any event, Petitioner had told ABC Petitioner wanted AT&T before either the affiliation agreement or Petitioner's Appendix E were prepared. *E.g.* Petitioner's Appendix B at 14-15, 18; trial tr. 366-67, 375-76, 603-04, 637-38, 648.

[19] *See supra* note 8.

[20] Petition at 7.

[21] *Ungar* v. *Dunkin' Donuts of America, Inc.,* 531 F.2d 1211 (3d Cir.), *cert. denied,* 97 S. Ct. 74 (1976); *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir. 1976); *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 446 F.2d 1131 (2d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972); *Capital Temporaries, Inc.* v. *Olsten Corp.,* 365 F. Supp. 888 (D. Conn. 1973), *aff'd* 506 F.2d 658 (2d Cir. 1974).

To understand Petitioner's post-trial retreat to reliance on a discredited theory of liability based on the contract alone, rather than the testimony, it should be noted that the testimony of Petitioner's chief witness turned out to be in crucial respects so contradicted by his prior testimony and by the testimony of others that the trial judge was constrained to inquire of Petitioner's witness: "Well, which testimony is the true testimony?"[22] Thus, Petitioner's position was and is nothing more than the obvious result of an effort to avoid the consequences of the trial court's evaluation of the credibility of witnesses.

The other reasons suggested by Petitioner for granting the writ are unexplained, have no apparent foundation in this case and are on their face without merit. Petitioner argues that this case would give the Court an opportunity to clarify its prior decisions in *Fortner Enterprises, Inc.*[23] and *Northern Pacific Ry. Co.*[24] Petitioner, however, does not suggest why either of these decisions need clarification or how this case would assist. *Fortner* was not even cited to the Seventh Circuit. Moreover, this court recently considered the *Fortner* case further in *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 45 U.S.L.W. 4171 (U.S. February 22, 1977) and held there was no tie-in.

Similarly, Petitioner's contention that this case is somehow important to the communications industry be-

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[22] Trial tr. at 364.

[23] *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495 (1969).

[24] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958).

cause it involves the policies and practices of the broadcast networks cannot be reconciled with Petitioner's stipulation that it was ABC's policy not to require affiliated stations to use any particular means or method of signal delivery.[25]

Finally, it is suggested that the Court should consider this case in order to "give conformity to the holdings and policies of the various circuit courts of appeals."[26] However, Petitioner does not suggest any way in which the holding of any circuit court of appeals is at odds with the holding of this case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 1, 1977

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[25] Petitioner also stipulated that in fact ABC affiliates used all manner and means of signal delivery. Pretrial Order Attachment A, dated February 5, 1976, ¶ 65 at 18-19.

[26] Petition at 7.